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In The

Supreme Court of the United States

October Term, 1980

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES and A. J. TAYLOR, its Secretary,

Petitioners,

v.

THE FLORIDA NURSING HOME ASSOCIATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT FLORIDA NURSING HOME ASSOCIATION

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QUESTION PRESENTED

Whether Florida waived eleventh amendment immunity from suit in federal court for retroactive damages when it entered into, and then breached, a contract with nursing homes providing services under the Medicaid program, where the contract provided that Florida and the nursing homes would recognize and abide by federal law pertaining to the Medicaid program, but where Florida failed to reimburse the nursing homes for services rendered on a reasonable cost-related basis effective July 1, 1976, as required by Public Law 92-603, §249, 42 U.S.C. §1396a(a)(13)(E).

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The Respondent, FLORIDA NURSING HOME ASSOCIATION, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 616 F.2d 1355.

PARTS OF PETITION ADOPTED

Respondent, FLORIDA NURSING HOME ASSOCIATION, adopts and incorporates by reference the following portions of the petition: (1) statement of parties to the proceeding; (2) opinions below; (3) jurisdiction; and, (4) constitutional and statutory provisions involved.

STATEMENT OF THE CASE

On March 8, 1977, Respondent FLORIDA NURSING HOME ASSOCIATION, on behalf of itself and all of its member facilities, filed a complaint in the United States District Court for the Southern District of Florida against the FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES (DHRS) and the UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE (HEW). This action, captioned *Florida Nursing Home Association, et. al. v. Page, et. al.* (hereafter *"Page"),* was brought under federal question jurisdiction, 28 U.S.C. §1331. The complaint alleged, among other things, (1) that nursing home providers should be reimbursed for services rendered to Medicaid patients on a reasonable cost-related basis effective July 1, 1976, as required by 42 U.S.C. §1396a(a)(13)(E)[1] and the Florida Nursing Home Medicaid Provider Agreement;[2] (2) that the then Florida Title XIX Medicaid Reimbursement Plan did not reimburse providers on a reasonable cost-related basis; and (3)

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[1]*42 U.S.C.* §1396a(a)(13)(E), provides in pertinent part: A State plan for medical assistance must . . . provide . . . effective July 1, 1976, for payment of the skilled nursing facility and intermediate care facility services provided under the plan on a reasonable cost related basis, as determined in accordance with methods and standards which shall be developed by the State on the basis of cost-finding methods approved and verified by the Secretary.

[2]Florida DHRS drafted and executed a contract with each nursing home provider in the Medicaid program which outlines the obligations of each party to the contract. Each nursing home provider had to sign the contract as a prerequisite to its participation in the Medicaid program. The sixth paragraph of the agreement states: "Both the provider and the single state agency hereby agree to recognize and abide by all state and federal laws, regulations and guidelines applicable to participation in and administration of the Title XIX Medicaid program."

that HEW regulation, 45 C.F.R. §250.30(a)(3)(iv),[3] which purported to require nursing homes to be paid on a reasonable cost-related basis effective January 1, 1978, was void because of its conflict with 42 U.S.C. §1396a(a)(13)(E).

While the *Page* action was pending before the district court, that court had before it a similar matter captioned *Golden Isles Convalescent Center v. Califano, et. al.*, 442 F. Supp. 201 (S.D. Fla. 1977). In the *Golden Isles* case, which was filed in October of 1976, several nursing home providers located in the southern part of Florida brought suit against DHRS to require implementation of 42 U.S.C. §1396a *et seq.* The plaintiffs in *Golden Isles* also sought to have 45 C.F.R. §250.30(a)(3)(iv) declared invalid.[4]

On October 18, 1977, the district court in *Golden Isles* held that 45 C.F.R. §250.30(a)(3)(iv) was invalid because it was in direct conflict with 42 U.S.C. §1396a(a)(13)(E), which set the effective date for reasonable cost-related reimbursement as July 1, 1976. The district court reserved its decision regarding the issue of whether the nursing home providers were entitled to reimbursement on a reasonable cost-related basis retroactive to July 1, 1976, but held that the *Golden Isles* homes were entitled to reimbursement on a reasonable cost-related basis from October 18, 1977, prospectively.

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[3]45 C.F.R. §250.30(a)(3)(iv) (1976), provides in pertinent part: The State plan shall set forth the methods and standards used by the State to determine reasonable cost-related payment rates, and shall set payment rates on the basis of such methods and standards, to be effective no later than January 1, 1978.

[4]HEW contended that this regulation was simply a statement of policy that it would not enforce the statute, 42 U.S.C. §1396a(a)(13)(E), until January 1, 1978. *See, Alabama Nursing Home Association v. Califano*, 433 F. Supp. 1325, 1330 (M.D. Ala. 1977).

The district court on January 5, 1978, granted, in part, a motion for summary judgment filed by the plaintiffs in the *Page* case. As part of its order, the district court adopted and incorporated by reference its decision in the *Golden Isles* case with regard to the rights of nursing home providers to be reimbursed on a reasonable cost-related basis. Accordingly, the court ordered that from October 18, 1977, prospectively, the *Page* nursing home providers were entitled to reimbursement on a reasonable cost-related basis. At that time, as in *Golden Isles,* the court reserved its decision regarding the question of retroactive relief.

On July 11, 1978, the district court consolidated *Page* and *Golden Isles.* The court then entered an order denying the claims of the nursing home providers for reimbursement prior to October 18, 1977, on the ground that such claims were barred by the eleventh amendment. The nursing home providers timely appealed this decision to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit reversed the judgment of the district court regarding the claims of the nursing homes for reimbursement on a reasonable cost-related basis prior to October 18, 1977. The Fifth Circuit noted that Florida created the Department of Health and Rehabilitative Services with authority to enter into contracts and to sue and be sued in contract actions. *Fla. Stat. Ann.* §402.34 (West Supp. 1979).[5] The court then concluded that Florida had not only waived its general immunity from suit in its own

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[5] §402.34 provides in pertinent part: The Department is a body corporate. . . . It shall have the power to contract and be contracted with, to sue and be sued in actions ex contractu but not in torts, and to have and to possess coporate powers for all purposes necessary to administer this chapter . . .

state courts by the promulgation of §402.34, but that it also waived its eleventh amendment immunity by drafting and executing a contract with each nursing home which outlined the precise obligations of the parties and which each nursing home signed as a prerequisite to its participation in the Medicaid program. The agreement bound both DHRS and the nursing homes to recognize and abide by all federal laws applicable to the Medicaid program.

On September 16, 1978, after HEW had approved a new reimbursement plan, the district court ordered that payment be made under the new plan from October 18, 1977, reserving for trial the question of whether the new plan met the statutory criteria of reasonable cost-related reimbursement.

Very recently, on July 29, 1980, the district court sent this new plan back to HEW for reconsideration because HEW's previous review concerning reasonable cost-related reimbursement was deemed insufficient under criteria recently announced by the Fifth Circuit in *Alabama Nursing Home Association v. Harris,* 617 F.2d 388 (5th Cir. 1980).

REASONS FOR DENYING THE WRIT

The Fifth Circuit, in its opinion below, correctly held that under the particular facts and circumstances of this case, Florida had waived its eleventh amendment immunity. Moreover, the principal case relied upon by Petitioner to support its position—*Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)—is readily distinguishable on its facts and is, therefore, not controlling.

In arguing that this Court should grant certiorari in the instant case, Petitioner asserts that the opinion below "effectively nullifies this Court's landmark decision" on

Edelman. (Pet. p. 11). Such an assertion by Petitioner, however, is without merit because *Edelman* is clearly distinguishable on its facts from the situation in the instant cause.

Edelman was an action brought by welfare recipients in Illinois against various state officials for administering the federal-state programs of Aid to the Aged, Blind, or Disabled (AABD) in a manner inconsistent with federal regulations and with the fourteenth amendment to the Constitution. More specifically, the plaintiffs in *Edelman* alleged that applications for welfare benefits were not being processed within the time frame set forth in the federal regulations and that, contrary to those regulations, the defendants were commencing payments only with the month in which an application was approved, and not making payments for prior eligibility months.

Unlike *Edelman*, which involved welfare payments in the nature of a dole to qualified individuals, the instant case involves compensation for services rendered pursuant to contract. In *Edelman*, the payment was in the nature of a gratuity. Whereas, in the instant case, Respondents who have already provided skilled nursing services pursuant to a contract with the state, are vested with a contractual right to compensation. Unlike the state defendants in *Edelman*, who did not enter into contracts with the recipients of the grant and who acted only as distributors of such grants, the Florida DHRS entered into written contracts with Respondents, which contracts must surely have implicitly provided for a mutuality of obligation and remedy. Thus, the instant case and *Edelman* represent two different situations.

In the instant case, the Fifth Circuit correctly concluded that the interaction and combination of various state actions supported the "overwhelming implication"

that Florida had indeed waived its eleventh amendment immunity.[6] The Fifth Circuit stated:

> While it is true that waiver of immunity under the Eleventh Amendment is not to be lightly inferred, *Edelman*, supra, 415 U.S. at 673, 94 S.Ct. at 1361, the "overwhelming implication," id., 94 S.Ct. at 1361, of the state's agreement with appellants is that it constitutes a waiver of Florida's constitutional immunity by requiring the DHRS to recognize and abide by all federal laws in participating in the Medicaid Program.
>
> 616 F.2d 1355 at 1363

The Florida legislature created the Florida Department of Health and Rehabilitative Services (DHRS)—the state agency responsible for the administration of Florida's Medicaid reimbursement program—as a "body corporate" with power to enter into contracts and to sue and be sued in actions sounding in contract. This power derives from Florida Stat. Ann. §402.34 (West Supp. 1979). This section provides in pertinent part:

> The Department is a body corporate.... It shall have the power to contract and be contracted with, to sue and be sued in actions ex contractu but not in torts, and to have and to possess corporate powers for all purposes necessary to administer this chapter....

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[6]Contrary to Petitioner's argument (Pet. pp. 17-20), an express statutory waiver of eleventh amendment immunity is not essential to a finding of waiver. *See, e.g., Petty v. Tennessee—Missouri Bridge Commission*, 359 U.S. 275 (1959). Also, this Court in *Edelman* acknowledged that waiver of eleventh amendment immunity will be found when there is "such overwhelming implication from the text as [will] leave no room for any other *reasonable construction.*" 415 U.S. 651 at 675 (emphasis added; citations omitted).

It is obvious from the above quoted statute that the power given to DHRS by the Florida legislature is unrestricted. Florida thoughtfully preserved its tort immunity but waived, without limit its immunity to suits in contract.[7]

Florida DHRS, acting pursuant to its corporate powers, not only entered the Medicaid area, but also drafted and executed a contract with each Florida nursing home which was to provide services under the Medicaid program. The particular language in the contract was chosen by the state and the entire contract was presented on a "take it or leave it" basis to nursing homes willing to provide services under Medicaid. The sixth paragraph of this agreement required both the nursing home provider and DHRS to recognize and abide by all federal laws applicable to the Medicaid program. The contract, therefore, obligated DHRS to reimburse nursing home providers on a reasonable cost-related basis effective July 1, 1976, as required by 42 U.S.C §1396a(a)(13)(E). Although the nursing home providers rendered services as required by their contracts with DHRS, Florida DHRS failed to honor its

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[7]Petitioner makes the rather broad statement that this Court "has consistently held that a state statute consenting to suit against the state constitutes consent to be sued in state court, not federal court." (Pet. p. 16). However, a close examination of this Court's cases relied upon by Petitioner for its broad assertion reveals that all of the cases involved matters exclusively within the state domain and most involved suits for refund of state taxes bases upon state statutes. See, e.g., *Great Northern Life Insurance Company v. Read,* 322 U.S. 47 (1944); *Kennecott Copper Corp. v. State Tax Commission,* 327 U.S. 573 (1946). The district court cases, *Pharmacists Society of Milwaukee v. Department of Health and Social Services,* 79 F.R.D. 405 (E.D. Wis. 1978) and *Medicenters of America, Inc. v. Commonwealth of Virginia,* 373 F. Supp. 305 (E.D. Va. 1974), come somewhat closer to supporting the Petitioners' general rule, but even those cases do not involve a situation where a state agency with the power to sue and be sued and to contract has entered into, and then breached, contracts with health care providers.

obligation to make reimbursement for those services on a reasonable cost-related basis.

When DHRS entered into contracts for Medicaid services with nursing home providers, DHRS voluntarily submitted itself to the jurisdiction of the federal courts and thereby waived its eleventh amendment immunity. On the basis of the actions by DHRS, the Fifth Circuit properly concluded:

> By contracting with appellants [nursing home providers] to be bound by all federal laws applicable to the Medicaid program, the state has expressly waived its Eleventh Amendment immunity and consented to suit in federal court regarding any action by providers alleging a breach of these laws.
>
> 616 F.2d 1355 at 1363

Thus, the Fifth Circuit arrived at the only reasonable conclusion that could be drawn from the actions taken by the State of Florida in this case. Florida voluntarily participated in the Medicaid program with the knowledge that the program was a creature of the Congress of the United States subject to a wide range of federal courts to hear and determine questions arising under the Medicaid Act. When it contracted with nursing home providers in the manner described above, Florida DHRS knew that aggrieved nursing home providers in the Medicaid program would seek redress in federal district court for issues involving federal law. Assuming that it was contracting in good faith, Florida must have intended these contracts to have mutual obligations and mutual remedies. If the nursing homes had breached the Medicaid provider agreement, DHRS could seek any form of redress, including retroactive relief in federal court. It is reasonable to conclude, therefore, that Florida intended to waive its eleventh

amendment immunity so that the nursing home providers would be able to seek similar redress.

The Fifth Circuit correctly concluded that to construe the actions of Florida DHRS in any other manner "could operate to immunize state officers and the agency from their contractual duty to adhere to federal statutory requirements."[8] The court pointed out that:

> A contrary holding in the circumstances of this case, where appellants Golden Isles and Florida Nursing Home have provided nursing services in accordance with their contractual and statutory obligations since July 1, 1976, would achieve an inequitable result.
>
> 616 F.2d 1355 at 1363

The inequity to which the Fifth Circuit referred is obvious. It is Florida's act of contracting with nursing home providers for services under the Medicaid law and, in fact, receiving those services while failing to comply with its obligation under federal law to pay providers on a reasonable cost-related basis. Florida's argument that DHRS' contract with the nursing home providers did not effect a waiver of eleventh amendment immunity is unreasonable because such an argument would not only permit, but would encourage the state to avoid its contractual obligations. Under its interpretation, Florida would be able to force the nursing home providers with whom it has contracted to split a single cause of action for damages for breach of contract between state and federal courts. The providers, seeking a definitive interpretation of federal law, would have to go into federal court to obtain such an interpretation, but could only obtain prospective relief in that forum. The providers would then have to file

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[8] 616 F.2d 1355 at 1363.

a separate lawsuit in state court to obtain retroactive relief. Clearly, such an interpretation of the contract and of Florida's intentions regarding the eleventh amendment issue is unreasonable. The only reasonable conclusion, indeed the "overwhelming implication," is that Florida voluntarily and intentionally waived its eleventh amendment immunity.

The Fifth Circuit, in its opinion below correctly analyzed the particular facts of this case and properly concluded that under the circumstances presented here Florida had waived its eleventh amendment immunity.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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